

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN PHILIP ASHLEY,

Defendant-Appellant.

UNPUBLISHED

June 10, 2014

No. 315361

Bay Circuit Court

LC No. 11-010927-FC

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(a), felony-murder, MCL 750.316(b), armed robbery, MCL 750.529, disinterment, MCL 750.160, four counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and one count of carrying a firearm with unlawful intent, MCL 750.226. Defendant was sentenced to serve prison terms of life without the possibility of parole for the murder convictions, 300 to 480 months for the armed robbery conviction, 17 to 120 months for the disinterment conviction, 24 months for the felony-firearm convictions, and 24 to 60 months for the carrying a firearm with unlawful intent conviction, with 471 days jail credit. Defendant appeals as of right. We affirm defendant's convictions, but vacate defendant's sentence on the armed robbery conviction, and remand for resentencing.

Defendant first argues that there was insufficient evidence to support his convictions for first-degree premeditated murder and armed robbery. He argues that the prosecution failed to present sufficient evidence that the killing was premeditated and deliberate, asserting that the evidence showed "desperation" and not premeditation. We review a sufficiency challenge "de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury's finding that the defendant was guilty beyond a reasonable doubt." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The Court "is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Thus, we resolve all conflicts in the evidence in favor of the prosecution, and we will not revisit credibility determinations. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Ortiz*, 249 Mich

App 297, 301; 642 NW2d 417 (2002). “Premeditation and deliberation may be inferred from the facts and circumstances established on the record.” *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991). “Minimal circumstantial evidence is sufficient to prove an actor’s state of mind.” *Ortiz*, 249 Mich App at 301. The following nonexclusive list of factors may be considered to establish premeditation and deliberation: “(1) the previous relationship between the defendant and the victim; (2) the defendant’s actions before and after the crime; and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds inflicted.” *Coddington*, 188 Mich App at 600.

At trial, defendant presented the defense of self-defense, and the jury was instructed accordingly.

“In Michigan, the killing of another person in self-defense is justifiable homicide if the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.” *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990); see also MCL 780.972(1)(a) (providing that a person may use deadly force against another if the person “honestly and reasonably believes that the use of deadly force is necessary to prevent the imminent death of or imminent great bodily harm to himself or herself or to another individual”). [*People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009).]

Defendant’s evidence that he acted in self-defense came through his own testimony. Defendant claimed that he shot the victim in self-defense, believing that the victim was about to draw a gun on him. The jury’s verdict demonstrates that they did not find his testimony credible. The jury was free to believe or disbelieve, in whole or in part, the testimony presented at trial. See *Ortiz*, 249 Mich App at 302.

Further, the prosecutor presented sufficient evidence so that a rational jury could conclude beyond a reasonable doubt that the killing was premeditated and deliberate. Defendant acquired and test-fired a gun shortly before the killing. Defendant arranged the meeting with the victim in a secluded place. Defendant took the gun with him to the meeting. Defendant earlier told his friends that he had to kill the victim before the victim killed him. Defendant bragged about the killing immediately afterwards. Perhaps most compelling, after shooting the victim in the head twice from point-blank range, defendant fled and then went to great lengths to hide the killing and his connection to it. “Minimal circumstantial evidence is sufficient to prove an actor’s state of mind.” *Ortiz*, 249 Mich App at 301.

At its core, defendant’s argument is an attack on the credibility of witnesses and the weight to be accorded to the evidence at trial, both of which are matters for the trier of fact to resolve. *Wolfe*, 440 Mich at 514-515. Therefore, viewing the evidence in a light most favorable to the prosecution, and deferring to the jury on matters of witness credibility, we conclude that sufficient evidence was presented at trial for a rational jury to find defendant guilty of first-degree premeditated murder.

Defendant also argues that the prosecutor presented insufficient evidence as to armed robbery, which would undermine his felony-murder conviction as well because armed robbery

was the predicate felony. Contrary to defendant's assertion, a rational jury could reasonably infer from the evidence that defendant intended to rob the victim while possessing a dangerous weapon. MCL 750.529. Defendant could not pay a debt he owed the victim. Defendant also knew that the victim had money and drugs, and the evidence established that he did in fact take money and other property from the victim, including the victim's coat which he immediately began wearing after the killing. Although defendant asserts that he first decided to take the property when he decided to burn the victim's car, a rational jury could reject defendant's assertion and conclude that defendant intended to rob the victim all along. Again, defendant is asking the Court to reassess witness credibility, a matter outside of its purview. Sufficient evidence was presented at trial for a rational jury to find defendant guilty of armed robbery, which in turn supports the felony-murder conviction.

Defendant next argues that the trial court erred in sentencing him to serve a minimum of 300 months on the armed robbery conviction. There is no preservation requirement for challenging sentences that are an upward departure from the statutory minimum sentencing guidelines range. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008), citing MCL 769.34(7). In reviewing a departure from the minimum guidelines range, the existence of a particular factor is a factual determination reviewed for clear error, the determination that a particular factor is objective and verifiable is reviewed as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the amount of the departure is reviewed for an abuse of discretion. *Id.* at 300.

Defendant's minimum sentencing guidelines range for armed robbery was 135 to 225 months. The sentencing court was required to articulate substantial and compelling reasons for sentencing defendant to a minimum of 300 months for the armed robbery conviction, because this sentence exceeded the 135 to 225 month minimum sentencing guidelines range. See MCL 769.34(3) ("A court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure."). A substantial and compelling reason for departure from the guidelines range only exists in exceptional cases and must be objective, verifiable, of considerable worth in determining the length of the sentence, and keenly or irresistibly grab the court's attention. *Smith*, 482 Mich at 299.

The trial court may not base a departure "on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." [*Id.* at 300, quoting MCL 769.34(3)(b).]

Finally, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Id.* at 299-300.

Here, the trial court provided two reasons for its departure: (1) the cold manner in which the offense occurred, and (2) the impact on the victim's family. Although these may constitute appropriate reasons for departure, the trial court "failed to explain why those reasons justify the extent of the departure." *Smith*, 482 Mich at 310. There is simply nothing in the record to

explain or justify the extent of the departure, which was 75 months more than the 225 months permitted under the guidelines. Because “the connection between the reasons given for departure and the extent of the departure is unclear, . . . the sentence cannot be upheld.” *Id.* at 314.

Accordingly, we vacate defendant’s sentence on the armed robbery conviction and remand for resentencing and for an explanation of the extent of any departure made on remand. In doing so, the sentencing court must explain “why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been.” *Smith*, 482 Mich at 304.

Affirmed in part, vacated in part, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Cynthia Diane Stephens